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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SURJIT P. SONI et al., Plaintiffs and Respondents, v. TONY NEMAN, Defendant and Appellant.	B222133 (Los Angeles County Super. Ct. No. BC398714)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. True, Judge. Affirmed and modified.

Weiss & Hunt, Thomas J. Weiss and Hyrum K. Hunt for Defendant and Appellant.

Soni Law Firm, Leo E. Lundberg and M. Danton Richardson for Plaintiffs and Respondents.

Business and Professions Code section 6129 (§ 6129) provides that "[e]very attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor. [¶] Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both."

When the defendant in this case, Tony Neman aka Homayoun Nemani (defendant), sought to use section 6129 as an affirmative defense against a claim by the plaintiffs that he owed them money, the trial court ruled there had not been presented sufficient evidence to support a jury instruction on the defense. By this appeal, defendant is challenging that ruling. He also challenges the inclusion, in the judgment, of the cost of certain attorney's fees that are claimed by plaintiffs. We have reviewed the record and we find there is not sufficient evidence to support an affirmative defense under section 6129, and there is not sufficient evidence to support the inclusion of the challenged attorney's fees in the judgment. We will therefore modify the judgment to delete the attorney's fee award, and affirm the judgment as amended.

BACKGROUND OF THE CASE

This case concerns (1) a promissory note (note) that was signed by defendant in his capacity as owner of a limited liability company, and was made in favor of the East West Bank (bank), and (2) two written personal guarantees (guarantees) that were given by defendant to the bank when the bank later agreed to modify the terms of the note by extending the date of its maturity and increasing its principal amount. The note was for

a residential construction loan made by the bank to defendant's company (1124 Marilyn Drive Development LLC (the company)). A deed of trust was placed on the property at 1124 Marilyn Drive in Beverly Hills, California to secure the promissory note, and later to secure the guarantees.

The company defaulted on that note and filed for bankruptcy; the bankruptcy was later converted to a Chapter 7 case. The bank put the note and guarantees up for sale at a discount and they were purchased in October 2007 by the plaintiffs, Surjit P. Soni and his wife Milena Soni. Surjit Soni is an attorney, Milena Soni is not. The bank assigned to plaintiffs all of its right, title and interest in the note and the guarantees, and, in January 2008 the bankruptcy court substituted plaintiffs in place and stead of the bank in the bankruptcy case.

In April 2008, plaintiffs sought relief from the bankruptcy stay so that they could foreclose on the property. They were granted such relief in May 2008 and began non-judicial foreclosure proceedings that same month. The property was purchased by Soni Holdings Beverly Hills, LLC, a company owned by plaintiffs, at a public auction non-judicial foreclosure on September 19, 2008. The purchase price of $5 million left a deficiency on the note of over $2.9 million. This deficiency was not paid and plaintiffs filed this action on defendant's guarantee on September 24, 2008 to recover the unpaid balance.

The case was tried to a jury. Plaintiff Surjit Soni was the only witness who testified. Judgment in the amount of $3,479,434.53 was entered on the jury's verdict.

Thereafter, defendant filed motions for a new trial and partial judgment notwithstanding the verdict. The motions were denied and this appeal followed.

DISCUSSION

1. *History of the Use of Section 6129 as an Affirmative Defense*

Based on the fact that plaintiff Surjit Soni is an attorney, the defendant asserts that section 6129's prohibition against attorneys either directly or indirectly purchasing an evidence of debt or thing in action, with the intent to bring suit thereon, is an affirmative defense that prevents plaintiffs from recovering against him in this action.

"The purpose of [section 6129], as is that of champerty laws in general, is to prevent the officious fomenting of litigation. (14 C.J.S. § 10, p. 360.) The outright purchasing by attorneys of claims which perhaps otherwise would never be sued upon obviously would tend to stir up a good deal of litigation if it were permitted; . . . " (*Martin v. Freeman* (1963) 216 Cal.App.2d 639, 643.) This explanation of the purpose of section 6129 appears to defy its application to the instant case as it is rather inconceivable that the bank, if it could not find a buyer for defendant's debt, would not have brought suit on its own behalf to collect on that debt. Nevertheless, as discussed below, our task in this appeal is to determine whether the trial court was presented with sufficient evidence at trial regarding plaintiffs' purchase of the debt to even bring the purchase within the literal language of section 6129.

The court in *Martin v. Freeman, supra,* 216 Cal.App.2d at p. 642 observed that section 6129 does not declare that a purchase coming within the terms of that statute is void, nor does the statute prohibit suing upon such a purchase. However, the *Martin*

court noted that a review of the case law history on section 6129's predecessor statute, former Penal Code section 161, shows that our Supreme Court has impliedly recognized that the statute can be used as an affirmative defense if it is "sustained by the evidence." (*Ibid*.)

In *Bulkeley v. Bank of California* (1885) 68 Cal. 80, 81, the plaintiff, an attorney, brought suit against a bank on the basis that he was an assignee of someone who had deposited a sum of money with the defendant. The court rejected the bank's affirmative defense, made under Penal Code section 161, that the plaintiff could not maintain the suit. The court stated there was an absence of evidence showing that the assignment was taken by the plaintiff with intent to bring suit, and it reasoned that it could not presume from the mere fact that the attorney took an assignment and later brought suit on it that the attorney had the intent to sue when the assignment was taken.

Likewise, in *Tuller v. Arnold* (1893) 98 Cal. 522, 524, the court rejected the defendant's claim that its motion for nonsuit should have been granted under Penal Code section 161 because plaintiff Tuller was an attorney. The court noted that the claims against the defendant, for goods sold and delivered, originated in Chicago and the persons originally holding the claims assigned them to a law firm in that city, which in turn routed them for collection to an attorney in California, and that attorney assigned them to the plaintiff as a matter of convenience for collection. The court stated: "There does not appear to have been any solicitation by any attorney to the assignors that these claims be put in suit, or that they were bought by the assignee for that purpose; but, on the contrary, the assignors put them in the hands of their attorneys for collection."

Based on the language and the history of section 6129, including published cases addressing both that section and its predecessor statute, we hold that the fact that an attorney purchases a debt and then is unable to collect on it without bringing a civil suit does not, by itself, support use of section 6129 as an affirmative defense to the suit. By our opinion, we intend only a narrow holding to acknowledge both the purpose of the statute, and the need to apply the statute literally so as to avoid precluding investors, who happen to be attorneys from making investments on which they may someday have to sue.

As the party asserting section 6129 as an affirmative defense and seeking to benefit from it, defendant had the burden of proving that attorney Soni purchased the note and guarantees *with the intent of bringing suit on the debt*. (Evid. Code, § 500; *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 54.) We hold that such burden requires only a presentation of evidence sufficient to prove the statute's application *by a preponderance of the evidence*. The burden of proof advocated by plaintiffs (proof beyond a reasonable doubt), is not applicable in such a case because the civil suit itself cannot result in the plaintiff attorney suffering the penal consequences prescribed by the statute, to wit, incarceration and/or a fine not exceeding $2,500. Issues of fact are usually determined by a preponderance of the evidence burden of proof. (Evid. Code, § 115.) "Generally, a higher burden of proof applies only where particularly important individual interests or rights, which are more substantial than the loss of money, are at stake." (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 365.)

2. *Use of Section 6129 in the Instant Case*

On appeal, defendant challenges the trial court's ruling that there was not sufficient evidence to give a jury instruction on the section 6129 affirmative defense. Defendant contends that the jury was presented with substantial evidence from which it could have reasonably inferred that attorney Soni did purchase the debt with the intent to sue on it.

Plaintiff Surjit Soni was the only witness at trial and he testified as follows. He is an attorney, a developer, and a real estate investor. In 2007, he approached the bank to inquire whether it would provide construction financing for a townhouse development project that he and his partners were in the process of acquiring. The bank declined to finance it but did suggest that he consider purchasing the subject promissory note of defendant's company. To make a determination whether such a purchase would be a good investment for himself and his wife, he visited the property at 1124 Maryland Drive; noted the listing price for that property because it was up for sale; examined the appraisal that was done for the property; researched community pricing and pricing of homes of that type; reviewed the bank's file on the note; and reviewed defendant's company's bankruptcy file and spoke with the bank's bankruptcy attorney. He was "sufficiently familiar" with bankruptcy procedures and issues and so he knew that defendant's first trust deed on the 1124 Maryland Drive property was "in a very good secured position" and if the property itself or the assets of the bankruptcy estate were more valuable than the note with its first trust deed and guarantees then there was a good chance that a buyer of those instruments would "get paid through the sale of that

property in the bankruptcy" or by resolution of the bankruptcy. The listing price on the property at that time was $8.5 million and he thought that was high. The property was appraised for $7.8 million, which he thought was a fair number, and the appraised figure was more than what was due on the note at that time. So, when he purchased the note, he believed he would not have to sue on it because of the value of the property and because it was in a very desirable part of Beverly Hills. He did not think it would ever come to having to sue defendant because the property was sufficiently ample to pay off defendant's note. He viewed the note as an investment because the note had an outstanding obligation of approximately $6.5 million, which he and his wife would be able to purchase for $4.5 million, and the property appeared to provide more than adequate collateral. If the note was paid they would realize a profit and he was convinced the property would be sold through bankruptcy proceedings. Also, defendant wanted to hold on to the property, and the person who held a second trust deed on it also wanted to own it. Thus, Soni believed that both of them were motivated to pay off the note to have the property. Community property funds were used to make the Soni's purchase of the note.

Defendant argues on appeal that in addition to this testimonial evidence of attorney Soni's position that he believed when he purchased the note that he would not have to sue on it, Soni also testified to other matters that could reasonably support a finding by the jury that Soni did purchase the note with an intent to sue on it to enforce it. Defendant contends the jury should have been instructed on section 6129 as an affirmative defense to this suit.

This additional evidence includes the following testimony from Soni. When plaintiffs purchased the debt from the bank, which was in late October 2007, Soni knew that (1) the debt was approximately two years and five months delinquent, (2) the borrower on the debt, defendant's company, was in bankruptcy, (3) there was litigation in the bankruptcy court between the bank and the holder of a second trust deed on the property and as successors in interest to the bank plaintiffs would be parties to that litigation, (4) the total amount of the debt (principal, interest, and other charges) at that time was approximately $6.5 million, (5) the bank was willing to sell plaintiffs the debt for $4.5 million, (6) the bank's appraisal of the property was at $7.8 million, (7) the property had been on the market for sale for some time, (8) if plaintiffs were to foreclose on the property they would have to receive permission from the bankruptcy court to do that, (9) if there was a deficiency after a foreclosure sale plaintiffs could sue defendant in his capacity as guarantor because defendant's guarantees were unconditional, and (10) if it were plaintiffs who purchased the property at the foreclosure sale they could hold on to it and sue for the difference between what they paid for it and the amount due on the note.

Additionally, defendant argues, plaintiffs would be able to charge defendant, as a portion of the outstanding debt, the cost of attorney's fees for legal work on the matter. Defendant asserts that the large discount of approximately $2 million given to plaintiffs by the bank, as well as the fact that during the two and one-half years of delinquency the property had not sold, suggested to plaintiff Surjit Soni that the property was not worth the amount of the debt. Defendant argues that Soni used his

own firm to litigate the debt with the holder of the second trust deed and that indicates he "intended to litigate the debt to the maximum advantage in collection," and the same inference is found in the fact that as a professional business litigator Soni knew he would have to bring proceedings in bankruptcy court and did so, and Soni was not content to acquire the property for $4.5 million but instead followed up by enforcing defendant's guarantees in this action.

When the trial court analyzed the evidence to determine whether it would support an affirmative defense of violation of section 6129, it ruled there was no evidence to support the defense because there was no evidence that plaintiffs' purchase of the debt "was anything other than a normal business transaction by a lender. There is no expert testimony saying that this would . . . have been a particularly unusual transaction, that the time frame and elements indicate that there was an immediate intent to sue and that the transaction was not one that a prudent normally-intended investor would engage in."

We are not convinced that defendant needed to present testimony from an expert to support a section 6129 affirmative defense, but we also do not find that the evidence on which defendant relies, either by itself or in conjunction with the other evidence set out above, is sufficient to support the defense. Thus, there was no error in not submitting the defense to the jury. At best, what the evidence indicates is that a jury could find that even though the real property appraised for $7.8 million, it was not certain that, from their investment of $4.5 million, plaintiffs would realize the entire $6.5 million dollars represented by the promissory note and its guarantees when they decided to sell the real property. However, the possibility of their realizing less than the

$6.5 million does not support an inference that the attorney plaintiff had the required intent to sue on defendant's guarantees to recover the deficiency. With having purchased the note and guarantees for far less than their book value, it is possible that plaintiffs would have been satisfied with a more modest profit from a sale of the real property than what a sale price of $6.5 million would bring them. A section 6129 affirmative defense does not address what options plaintiff Surjit Soni had when he and his wife purchased the evidence of the debt, it addresses his intent at the time of such purchase.

3. *The Jury's Award of $655,306.99 for Attorney's Fees Is Not Supported by Sufficient Evidence*

A provision in the promissory note addresses attorney's fees that could be incurred by the bank if defendant's company did not pay on the note. "Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorney's fees and Lender's legal expenses, whether or not there is a lawsuit, including attorney's fees, expenses for bankruptcy proceedings (including efforts to vacate or modify any automatic stay or injunction), and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law."

One of the issues raised by defendant in his motions for new trial and partial judgment notwithstanding the verdict was that the jury's award to plaintiffs of $655,306.99 as attorney's fees is not supported by substantial evidence. Those attorney's fees were not for legal work performed by plaintiff Surjit Soni's own law

firm. Defendant argued in his motions that although plaintiff Soni was permitted to testify, over defendant's hearsay objection, that this other law firm told him that the $655,306.99 was the amount of that firm's charges for litigation relating to the subject property, plaintiff also testified that he did not pay those charges and he had no information from the bank that it paid them.[1] Defendant observed that when the jury, in deliberation, asked the court whether there was any evidence that anyone paid the $655,306.99 the jury was told there was no such evidence.

In their trial court papers filed in response to defendant's post-trial motions, plaintiffs did not present a declaration from their own attorney to rebut the assertions of fact made by defendant's attorney in his declaration. Rather, plaintiffs argued that the attorney's fees "may have been covered by insurance—something defense counsel acknowledged before the Court though there was no evidence of this presented to the jury." Plaintiffs argued that the possibility of such insurance coverage "does not negate the fact the subject fees are charges that are obligations of the debtor under the note and, in turn, of the guarantor under the guaranty agreement." Plaintiffs cited the collateral source rule as authority for their position (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 729-730), and they make this same argument in their appellate brief. However, plaintiffs' argument is flawed. The collateral source rule is not applicable in contract

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[1] These assertions of what plaintiff Soni testified to at trial were made in a declaration by one of defendant's trial attorneys. The declaration was presented to the court in support of defendant's post-trial motions. Defendant's attorney also stated in his declaration that there was no evidence that plaintiff or the bank incurred the legal fees expense. In the motion papers defendant stated that the fees were for title litigation.

cases. (*Bramalea California, Inc. v. Reliable Interiors, Inc*. (2004) 119 Cal.App.4th 468, 472-473; *Plut v. Fireman's Fund Ins. Co*. (2000) 85 Cal.App.4th 98, 107-110.)

Moreover, the trial court should have sustained defendant's hearsay objection to plaintiff Soni's testimony that he (Soni) was told the law firm charged $655,306.99 for title litigation. There was no evidence presented by someone in authority at that law firm regarding who incurred the fees and the amount of fees, nor from the bank attesting to it having incurred fees in a certain amount pursuant to its rights under the note. Absent admissible evidence that either the bank (or plaintiffs as the bank's successors in interest), incurred attorney's fees because of litigation under the note, fees were not awardable to plaintiffs. Further, absent admissible evidence that awardable fees were incurred in a specific amount, no amount of fees would be properly awarded. Although plaintiffs argue that defendant did not present evidence to challenge their assertion that the law firm represented the bank in title litigation under the note, and did not present evidence challenging the sum of $655,306.99, it was plaintiffs who had the initial burden of proof on those matters and they have not demonstrated to this court that they met that burden.

Lastly, we reject plaintiffs' argument that because there was no breakdown by the jury as to how it arrived at the amount of money it awarded to plaintiffs, defendant has not demonstrated that the $655,306.99 was included in the jury's award. Plaintiffs argued to the jury that it should find in favor of plaintiffs in the amount "reflected on exhibit 8," and that amount is $3,477,651.77. The jury actually awarded the plaintiffs

$3,479,434.53. Clearly the challenged attorney's fees were included in the jury's award. The award of such fees was error.

DISPOSITION

The judgment in favor of plaintiffs is modified to delete the sum of $655,306.99, and as modified, the judgment in favor of plaintiffs in the amount of $2,824,127.54 is affirmed. The parties shall bear their own costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.